SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

No. 314. *vs.*

WILLIAM VOIGT,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Defendant in Error.

STATEMENT OF CASE.

This action was originally brought by William Voigt, an express messenger of the United States Express Company, to recover damages from the Baltimore & Ohio Southwestern Railway Company for injuries inflicted on him while traveling on its railroad in the course of his business as express messenger. The injuries were caused in a collision on defendant's road near Coal City, Ohio, which collision, it is admitted, resulted from the negligence of the plaintiff in error, defendant below.

The railroad company filed its answer, the second paragraph of which set up two contracts, one of which existed

between the express company and the railroad company, whereby the former agreed to protect and save harmless the latter from claims on account of injury to the messengers of the express company, and the other a contract between the express company and defendant in error, as one of its messengers, whereby he agreed that he would relea e the railroad company from any liability for injuries that might be inflicted upon him by the negligence of the railroad company, its servants, agents or employes, or otherwise.

To this second defense a demurrer was interposed; the demurrer was sustained, and the case came on proceedings in error into the Circuit Court of Appeals for the Sixth Circuit, plaintiff in error alleging that the Court below erred in sustaining the demurrer. The opinion of the Court below sustaining the demurrer is reported in 79 Fed., 561.

Thereafter the case came on for hearing and a question of law therein arising was certified by said Circuit Court of Appeals to the Supreme Court of the United States for its instruction. The question is set out in full in the printed certificate filed in this case and is summed up by the Court as follows:

"Does said railroad company assume towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of the employes of railroad company?"

ARGUMENT.

I.

We contend that the plaintiff was entitled to all the rights of a passenger for hire of a common carrier; that among these was the right to be carried under the protection of the law imposing upon the carrier the duty of exercising a high degree of care and diligence; that the law forbids the carrier to exempt itself by contract from the obligation of this imposed duty; that in the Federal courts and in Ohio, where this contract was made, no contract stipulating for such exemption is upheld, and what is not permitted to be done directly may not be accomplished by indirection.

The proposition that the rights of an express messenger are those of an ordinary passenger for hire of a common carrier is supported by an almost unanimous consensus of authority.

Fordyce v. *Jackson*,, 56 Ark., 594.
Yeomans v. *Co.*, 44 Cal., 71.
Woodworth v. *Co.*, 26 O. S., 585.
Blair v. *Co.*, 66 N. Y., 313.
Brewer v. *Co.*, 124 N. Y., 59.
Kenney v. *Ry. Co.*, 125 N. Y., 422.
Chamberlain v. *Co.*, 11 Wis., 248.
Chamberlain v. *Pierson*, 87 Fed., 420.
Jennings v. *Co.*, 15 Ont. App., 477.
Thomas v. *Co.*, 79 Ky., 160.
Jones v. *Co.*, 125 Mo., 666.
R. R. Co. v. *Wilson*, 79 Tex., 371.
Hutchinson, Carriers, §§ 564 and 565.
Ray, Imposed Duties, Passengers, Carriers, 9.
Am. & Eng. Ency. Law, 512.

All of these cases hold that an express messenger, though sometimes carried in a special car, is a passenger, and, inasmuch as his carriage is provided for in the price paid for carriage of the express matter, he is not a free passenger,

but a passenger whose passage money has been paid—a passenger for hire of a public or common carrier.

The relations of a postal or mail clerk to the railroad company which carries him with the mail matter present an analogy to those of an express messenger, which has not escaped the notice of courts or of text-book writers. Both are passengers whose carriage is merely incidental to the transportation of parcels or valuable merchandise of which they have charge. They travel alike in a special car or a part of a car furnished and set apart for this business by the carrier. Sometimes they occupy merely different parts of the same car. They are both employes of public carriers, whose right to send property over the line is secured by private contract. Much of the matter carried by one could, in the ordinary course of business, be carried by the other. One of these public carriers enjoys a monopoly over the letter mail, the other a practical monopoly over parcels, packages or paper sent "C. O. D.," the postal service here not embracing, as it does abroad, collection of charges on articles sent by mail.

Both the postal clerk and the express messenger derive their right to ride on the train, in so far as payment of their passage money is concerned, from the contract by which the railroad company carries the goods. The express company's contract stipulates that no extra charge shall be made for the messenger. The law provides that the contract price for carrying the mail shall include the right of the postal clerk to travel with the mail without extra charge. In neither case is the contract one which the railroad company is obliged to make. In both cases the contract with the railway company is silent as to any release of liability by the postal clerk or the express messenger, although the railway company, as to liability for the latter, is guarded by an indemnity from the express company. The express

messenger or messengers and the postal clerk or clerks constitute a special class of passengers for hire, for whose accommodation and safety the carrier is bound to be diligent to provide. They lose none of the rights of an ordinary passenger for hire, but they constitute a separate or special class of passengers, precisely as drovers riding with cattle on freight trains, where the carrier is not bound to carry passengers, are, in the Federal Courts at least, a class of passengers for hire, subjected to peculiar dangers, but entitled to a care on the part of the carrier that, in the words of the Supreme Court in the Lockwood case, 17 Wall., 357, and the Horst case, 93 U. S., 291, is measured by the highest degree of human skill and foresight.

There is an unbroken current of authority to the effect that a postal clerk is a passenger for hire.

Arrowsmith v. *Co.*, 57 Fed., 165.
Gleeson v. *Co.*, 140 U. S., 435.
Seybolt v. *Co.*, 95 N. Y., 562.
Nolton v. *Co.*, 15 N. Y., 444.
Magoffin v. *Co.*, 102 Mo., 540.
Mellor v. *Co.*, 105 Mo., 455–460.
Jones v. *Ry. Co.*, 125 Mo., 666.
Hammond v. *Co.*, 6 S. C., 130.
Hale v. *Grand Trunk Co.*, 60 Vt., 605.
Libby v. *Co.*, 85 Me., 34.
Kingman v. *Co.*, Ky., 35 S. W., 264.
Ry. Co. v. *Wiley*, 72 Md., 36.
Gulf Ry. Co. v. *Wilson*, 79 Tex., 371.
Ketcham v. *Co.*, 133 Ind., 346.
Ry. Co. v. *Shott*, 92 Va., 34.
Collett v. *Co.*, 16 Adolph & E. N. S., 984.

In the case of *Yeomans* v. *Steamship Company*, 44 Cal., 71, it was held:

"That if an express company hires its freight transported on a steamer or railroad of a company engaged in transporting freight and passengers for hire as common carriers, and hires an agent to take charge of such freight whose passage is paid for in the contract, such agent occupies the *position of an ordinary passenger* as to the liability of the

common carrier for injuries he may sustain caused by the negligence of its employes."

In the case of *Kenney* v. *R. R. Co.*, 125 N. Y., 422, the action was brought to recover for death caused by the negligence of defendant while decedent was traveling as express messenger. It was contended by the railroad company that all its relations to decedent were governed by its contract with the express company, but the Court treated the messenger as the passenger for hire of a common carrier, and held that the contract would not operate to release the railroad company from liability for negligence.

The contract in question was expressed in the following words, p. 424:

"Party of the first part (the railroad company) is hereby expressly released from and guaranteed against any liability for any damage done to the agents of the party of the second part, whether in their employ as messengers or otherwise."

The Court say, p. 426:

"This clause may be read not necessarily as releasing or preventing an action by employes of the express company against the railroad company for damages for injuries received while on the road, but as an agreement to indemnify the railroad company in the event of such action. That would be a perfectly proper agreement for the parties to make."

In the case of *Brewer* v. *R. R. Co.*, 124 N. Y., 59, also the case of an express messenger, the Court say, p. 64:

"The negligence of the defendant was the violation of its duty; it was the want of the care to which plaintiff's intestate was entitled for his protection. This duty and this right did not depend upon or rest upon the contract, but upon the relation as carrier of the plaintiff and the care which the defendant as such, was required to exercise. * * * The contract between the companies did not relieve the defendant from its duty to exercise due care for the protection of the messenger, nor did the defendant take from it any right to disregard such duty. Whatever right

to relief from the consequences of its negligence in that respect the defendant derived from the contract arose by way of indemnity upon the stipulations of the express company. The deceased was a passenger and therefore the refusal of the Court to charge to the contrary was no error. The location of the express car in the train did not deny him the benefit of that relation."

In the cases of *Bates* v. *R. R. Co.*, 147 Mass., 255, and *Hosmer* v. *R. R. Co.*, 156 Mass., p. 506, the express messenger was held to be a passenger for hire of a common carrier, but as the privilege of riding free in the baggage car was one which the company was not required to grant, it was held on the authority of *Quimby* v. *R. R. Co.*, 150 Mass., 365, in which case one who was riding on a *free pass* was held bound by the stipulation of release, that the carrier had the right to attach to the grant of such *free* privilege a stipulation for exemption from the consequences of its negligence or that of its agents.

In the case of *Commonwealth* v. *R. R. Co.*, 108 Mass., 7, a railroad company, in consideration of the payment to them by a person of a certain sum of money per year in quarterly installments, and of his agreement to supply the passengers on any one of any of their regular trains with ice water, issued season tickets to him quarterly for his passage on any one of their regular trains and permitted him to sell popcorn on all their trains. It was held that his relation to the company while traveling on the railroad, under this contract, was that of a passenger for hire, and that no conditions printed upon the back of the ticket could have the effect to relieve defendants from their legal liability for gross negligence and carelessness. On page 11 the Court say:

"It appears to us that under this state of facts he must be considered a passenger. It certainly can make no difference that his object in traveling was to sell his merchandise while in the act of traveling and that he had no other purpose in going over the road. Like other season ticket hold-

ers he paid the defendants for the privilege of passing and repassing regularly over the road and was at liberty to go or not, as he pleased. * * * He was traveling on his own business and not on that of the defendants."

In *Jones* v. *Co.*, 125 Mo., 666, the Court say, p. 675:

"Plaintiff was transported over defendant's road under a contract which was supported by a sufficient consideration, and he was entitled to the rights of a passenger in respect of the careful running and management of the train. The rights of plaintiff and the obligations of the defendant to him under this contract do not differ materially in these respects from those which are implied under contracts between a transportation company and the Government, by which the former agrees to carry the agents who have charge of the mails, or *under contracts with express companies to transport their agents, who* are in charge of their business, or with shippers of live stock to carry the persons in charge of the stock. Under these contracts the persons carried are uniformly held entitled to the protection of passengers. * * * It is settled law in this state that a carrier can not by contract stipulate against its own negligence. This rule in its application to the carriage of passengers has never been relaxed."

In the case of *Railway* v. *Ketcham*, 133 Ind., 346, the Court say, p. 350, in answer to the proposition that a postal clerk was not a passenger:

"It may be pertinent to inquire what relation the appellee bore the appellant if not that of a passenger. Having, as we think, a lawful right in the train he certainly is not an intruder or a trespasser. * * * He is not employed by the appellant. * * * He is, in our opinion, a passenger, having the same rights in relation to the recovery of damages for an injury sustained on account of the negligence of the railway company as *any other passenger*. The fact that he may ride in a postal car can make no difference with his right of recovery of damages for an injury sustained by reason of a collision resulting from the negligence of the railway company. The postal car, the smoking car, the ladies' car and the parlor car, they all constitute one train and are upon the train for the purpose of carrying passengers. * * * The liability of the railway

company to a passenger for damages resulting from the negligence of its employes is the same whether he be in one car or another, so he has a lawful right to be in the car he occupies.

"A complete, and we think a legitimate, answer to the proposition that the passenger would not have been injured had he been in another car than that in which he was riding at the time of the injury is, that he would not have been injured at all had it not been for the negligence of the railway employes which caused the collision.

"We think, independent of any statute, the current of authority is almost unanimous to the effect that mail agents occupy the same relation to the company as any other passenger."

In the case of *Jennings* v. *R. R. Co.*, 15 Ont. App., 477, the action was for negligence in causing death of an express messenger. The Court say, p. 483:

"He was lawfully on their train *as a passenger*, either with their assent or under some agreement, express or implied, between them and the express company, and the duty was thereby cast upon the railway company to carry him safely."

In *Ry. Co.* v. *Wilson*, 79 Texas, 371, the Court said:

"We are of opinion that essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in the employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, *express agents* or messengers and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances.

"Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the car or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person, is a matter of no importance.

"It is enough that he is lawfully on the car and entitled

to transportation to give to him the character of passenger and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part.

"If there be necessarily more danger in traveling in the coach prepared and used for the transportation of mail, even when due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a mail agent assumes the risk of danger necessarily thus arising from the position of the mail car in the train, but he does not assume any risk of danger that may result from the negligence of the carrier or its servants.

"The charge which sought to relieve appellant from liability because appellee was in the mail car instead of a car prepared and used for ordinary passengers was properly refused in this case, because appellee was in the mail car, the very place where appellant intended he should be and where his duty called him.

"The contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car, and if appellant or its servants failed to use that degree of care prescribed by the charge of the Court for his safety, then the appellant was liable.

"This is not a case in which a passenger was injured because he placed himself uninvited in a car in which the carrier did not intend he should travel, when with safety he would have been carried in the car intended for him."

In the case of *Arrowsmith* v. *Ry. Co.*, 57 Fed. Rep., 165, which was an action for negligence causing the death of a postal clerk, the Court say, p. 167:

"We shall treat the deceased in all respects as a passenger for hire. The railroad company having contracted for the carriage of the U. S. mail over this line, contracted at the same time safely to carry the mail clerks having custody thereof. The compensation for the carriage of such clerks must be regarded as included in the compensation paid by the Government for the carriage of its mails. It is immaterial who pays the compensation for the carriage of such passenger. The legal relation of passenger and carrier must be taken to have existed at the time of his injury between the deceased and the railroad company with whom the contract for his carriage had been made by the Government."

The case of *Chamberlain* v. *Pierson*, 87 Fed., 420, was a case in which an express messenger was injured by negligence of the railroad company, which set up in an action by him to recover, the fact that he was traveling under a contract which gave him transportation at his own risk. The Court say, p. 421:

"If it be conceded, as claimed by the railroad company, that the contract between it and the express company accorded the plaintiff free transportation at his own risk, yet it is well established that such a contract will not relieve the railroad from responsibility for an injury resulting from the negligence of its agents. One of the earliest decisions of the Supreme Court on this question is *Railroad Co.* v. *Derby*, 14 How., 467. In this case the plaintiff was president of another company, and a stockholder in the road on which he was riding. He was on the road by invitation of the president of the company—not in the usual passenger cars, but on a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The Court said: 'The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between parties, nor affected by any social relation, or otherwise, which they bore to each other.'

"*Railroad Co.* v. *Lockwood*, 17 Wall., 357, is a leading case on this subject. The Court here held: '(1) That a common carrier can not lawfully stipulate for exemption from responsibility, when such exemption is not just in the eye of the law. (2) That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter. (4) That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.'

"In *Waterbury* v. *Railroad Co.*, 17 Fed., 671, the doctrine is thus stated (syllabus): 'The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for neg-

ligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a matter of favor to him.'

"The principles recognized in the cases we have cited, and in numerous other decisions, were correctly applied by the judge who presided in the court below. The plaintiff, Pierson, as an express messenger, was rightfully on the train of the defendant, in the performance of duties which the railroad company had, by its contract with the express company, agreed that he should perform, and which, the contract states, were 'for the mutual benefit and account of the parties thereto.'"

The case of *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S., 435, was an action brought by Gleeson, a postal clerk, against the railway company on whose line he was employed as route agent, for an injury sustained by him while riding in the mail car by the derailment of the train caused by the fall of earth upon the track from the steep sides of a cut through which the line passed.

The Court held that Gleeson, as a passenger, had the right to rely on the mere occurrence of the accident as proof of negligence, and proceeded throughout the decision upon the theory that he was a passenger for hire of a public or common carrier.

That the status of the postal clerk as a passenger is derived from his relation to the common carrier as one carried by it for hire, and not from the statute of the United States, which provides, Rev. Stat., § 4000—

"Every railroad company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon with the person in charge of the same,"

was determined in the case of *Ry. Co.* v. *Price*, 113 U. S., 218, in which case Price, a postal clerk, sought to avoid the effect of a decision of the Supreme Court of Pennsylvania, which had held, construing a statute of Pennsylvania, that as a postal clerk he was not a passenger, by claiming in the Supreme Court of the United States that his right to be on

the train and his status there as a passenger were fixed by the United States statute above quoted.

The Supreme Court denied his claim and said, p. 221:

"We do not think these provisions, *i. e.*, of the U. S. statutes, either aid or govern the construction or proviso in the Pennsylvania statute. The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail nor because no other compensation is made for his transportation than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the Government to carry him, affect the question. It would be just the same if the company had contracted with *any other person who had charge of freight on the train to carry him without additional compensation.* The statutes of the United States which authorize this employment and direct this service do not therefore make the person so engaged a passenger, or deprive him of that character in construing the Pennsylvania statute. Nor does it give to persons so employed any right as against the railroad company *which would not belong to any other person in a similar employment by others than the United States.* We are therefore of opinion that no question of federal authority was involved."

In *A. G. S. R. R. Co.* v. *U. S.*, 25 Ct. of Cl., 30, it was said to be well settled that a railroad company, not a "land grant" road, can not be required by the Government to enter into a contract to carry the mails.

The right of the Government, therefore, to use the railroads to transport the mails and postal clerks is as much a matter of private contract as is the right of the express company to use the railroads to transport express matter and messengers.

The Court in the Gleeson case, 140 U. S., 435, by holding the railway company to the highest degree of care and foresight determined that the relation of the railway company to a postal clerk was that of a public or common carrier of passengers and not that of a private carrier. A private carrier of passengers is "not subject to any such stringent

obligations and responsibilities." *Shoemaker* v *Kingsbury*, 12 Wall., 369.

That a postal clerk's status or footing as a passenger, or the character of his relations to the carrier is in no wise different from that of an express messenger and does not depend upon any act of Congress, is shown by the decision of the Supreme Court in *Price* v. *Ry. Co.*, quoted above.

The contention of plaintiff in error therefore resolves itself into the single proposition that the relation of an express messenger to the railroad company as the passenger for hire of a public or common carrier is changed by his entering into a contract releasing the railroad company from liability for negligence.

We think the mere statement of the proposition carries its own refutation with it. As was said in the case of *R. R.* v. *Lockwood*, 17 Wall, at page 376:

"It is argued that a common carrier by entering into a special contract with a party for the carriage of goods or persons on modified terms drops his character and therefore may make any contract he pleases—that is, he may make any contract whatever, because he is an ordinary bailee, and is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning.

And on page 383:

"In the case before us the law fixes the degree of care and diligence due from the railroad company to persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care or diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

It should also be remarked that the contract for carrying the mails and the contract for carrying the express matter

are equally silent as to any release or stipulation for exemption to be entered into by either the postal clerk *or the express messenger.*

In the contract for carrying the express messenger the railroad company does not disclaim liability as a common carrier for negligently injuring him; on the contrary, it anticipates and provides for such liability by requiring the express company to indemnify it against precisely such liability. This it may do just as it may effect any other insurance, and, presumably, as a premium for such insurance the sum paid by the express company for services and facilities is *pro tanto* less. Nor as was said in the case of *Phenix Ins. Co.*, 129 U. S., 397; 117 U. S.,.312, this contract for insurance does not contravene public policy, for it is not a contract for exemption from liability for negligence, but a contract to provide funds to meet such a liability. Now as is shown in *Seybolt* v. *Ry. Co.*, 95 N. Y., 562, an attempt on the part of the railroad company after the right of the postal clerk to ride became fixed by the contract and his status as a passenger thereupon became fixed by the rules of law, to procure a release from liability for negligence, is nugatory and void. It follows that a similar attempt by the railway company after the right of the express messenger to ride on the train had been secured and paid for, and his status as a passenger became fixed by law, would be equally nugatory. And if the railroad company could not itself require such a contract or enforce it when made, it could not procure it to be made by any agent for it or with a third party for its benefit, for if it is itself forbidden by the policy of the law to make such a contract it can not avail itself of such a contract made for its benefit.

In this case it is not contended by counsel, that if the contract between the express company and the railroad company had contained no provision whatever as to liability of the railroad company for wrongfully killing or in-

juring the express messenger, that the right of action would not exist, or that the express messenger would not be a passenger for hire. Nor could it be maintained that if the railroad company had thereupon contracted with an insurance company or the express company itself for indemnity against such liability that the express messenger, even if that fact were known to him, would be held to have lost his right of action, or that his status as a passenger for hire would be affected. Now, however, the express company, not at the instance nor for the protection of the railroad company, nor in pursuance of any of the terms of the contract under which the railroad company agrees to and does carry the express freight and messengers, but solely to reduce to a minimum its own liability on its contract of insurance or indemnity, procures the signature of the express messenger to a contract exempting the railroad company from liability for its negligence. It is the same as if one having a pecuniary interest in the railway company should require his traveling salesman to release the railway company as a condition of his employment.

II.

Even if the express company's contract with the railroad company were treated as a private contract, the express messenger, whose right to ride on the train was thereby secured, would none the less sustain to the railroad company the relation of passenger for hire to a common carrier.

In the case of *R. R. Co.* v. *Stevens*, 95 U. S., 655, the plaintiff being the owner of a patented car coupling, was negotiating with the defendant at Portland, Maine, for its adoption and use by the latter, and was requested by the defendant to go to Montreal to see the superintendent of its car department. It is perfectly clear that this was a private contract, into which the railroad company could not

be compelled to enter. The plaintiff consented to go, and was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes. It bore the following printed endorsement:

"The person accepting this free ticket, in consideration thereof assumes all risks of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person of the passenger using this ticket."

The Court say, p. 658:

"It is evident that the Court below regarded this case as one of carriage for hire and not as one of gratuitous carriage, and hence, under the ruling of this Court in *R. R. Co.* v. *Lockwood*, 17 Wall., 357, it was a case in which the defendant, as a carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view we think the Court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, is not a matter of charity or of gratuity in any sense. It was by virtue of an agreement in which the mutual interest of the parties was consulted. The pass was a mere ticket, and no evidence of any contract by which the plaintiff was to assume all the risk, and *it would not have been valid if it had been.* * * * The Court rightly refused, therefore, to charge that the plaintiff was traveling on the conditions endorsed on the pass, or that if he traveled on that pass, the defendant was free from liability. * * * It is strongly urged, however, that the plaintiff's acceptance of the pass should be regarded as competent evidence that such a pass was in the contemplation of the parties when the arrangements as to his going into Montreal were made. But we have already shown that the carrying of the plaintiff into Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. The defendant being, by

the very nature of the transaction, a common carrier for hire, can not set up as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on. Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *R. R. Co.* v. *Lockwood*. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire."

The leading case, *R. R. Co.* v. *Lockwood*, 17 Wall., 357, was a case in which the railroad company sought to shield itself from liability to a drover who was injured by the negligence of the railroad company while he was being carried by them accompanying certain stock which he had shipped. The stock was shipped under a special contract whereby the drover had agreed to attend to the loading, transferring and unloading of the stock, and to take all risk to them and of personal injury to himself. The Court held:

"First. That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Second. That it is not just and reasonable in the eye of the law for the common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Third. That these rules apply both to the carriers of goods and carriers of passengers for hire, and with special force to the latter.

"Fourth. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

It will be noted that the relationship of Lockwood to this contract was a double one. There were, in fact, two contracts. One was for the carriage of the cattle by the company, which, as a common carrier of goods, was not permitted to insert the unreasonable stipulation for exemption

from responsibility for negligence; the other was a contract with the company as as a passenger carrier for his transportation, as to which contract such stipulation is equally invalid, but for different reasons. This distinction is pointed out in Hutchinson on Carriers, Section 567, as follows:

"This distinction is based upon wholly different reasons of public policy, being in the one case the value which the law puts upon human life and personal safety, and, in the other, the necessity of preventing frauds and combinations to the undoing of all persons who may have dealings with the carrier."

It is important to note this, as it is contended in the case at bar that the contract for the shipment of express matter was not a common carrier's contract, and therefore the Lockwood case does not apply. But the Lockwood case would evidently have been decided in the same way if there had been no shipment of cattle to be considered, for if one becomes a passenger for hire his rights as such are not affected by any contract he may make, private or otherwise, for the shipment of his goods.

The Court say, page 383:

"In the case before us, the law fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of law to allow stipulations which will relieve the company from the exercise of that care and diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

On page 376 the Court say:

"It is argued that a common carrier, by entering into a special contract with a party for the carriage of goods or persons on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases—that is, he may make any contract whatever because he is an ordinary bailee and he is an or-

dinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. * * * When a carrier has a regularly established business for carrying all or certain articles, and especially when that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the article is embraced within the scope of its charter powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character."

In the case of *R. R. Co.* v. *Curran*, 19 Ohio State, p. 1, cited in the Lockwood case, the Court say, p. 12:

"It is true that carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry, but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods, applies with still greater force in the case of passengers. The common law has a peculiar regard for human life, and for this reason exacts a greater degree of care than in relation to any matter of mere property."

In the case at bar counsel admit that in the absence of the contract the law would impose upon the railroad company the duty as a common carrier of passengers of carrying the express messenger safely. How then may it contract to be relieved of this duty? To say that the contract changed the relation of the messenger as a passenger is simply another way of saying that the contract has relieved it of the duty.

The principles laid down by the Court in the Lockwood case are enforced in the later cases of

Liverpool Co. v. *Phenix Co.*, 129 U. S., 397.
Inman v. *Ry. Co.*, 129 U. S., 128–139.
Phenix Co. v. *Transp. Co.*, 117 U. S., 312–322.

V.

Counsel rely upon the cases of

Bates v. *R. R. Co.*, 147 Mass., 255.
Hosmer v. *R. R. Co.*, 156 Mass., 506.
Ry. Co. v. *Keefer*, 146 Ind., 21.

While these Massachusetts cases hold that an express messenger for the passenger for hire of a public or common carrier, yet they are at variance with the Federal authorities in holding that an ordinary passenger for hire may, in consideration of a special privilege on the train, make a valid contract releasing the carrier from liability for negligence. The Federal rule is that no consideration can support such a contract; that the obligation to exercise the degree of care imposed by the law upon the public or common carrier can not be escaped by a contract for exemption, no matter what consideration is set up to support it.

In Massachusetts the railroad companies were required by statute to extend to all express companies the same facilities. They were therefore in Massachusetts common carriers of express companies. The messengers were required by the railroad company to sign a release, pursuant to a notice posted in the baggage car, as follows:

"No *passenger* will be allowed to ride in the baggage car of any train unless he has signed a release discharging the company from all claims in any way growing out of any accidents or injuries while riding in such car."

It was held in the Bates case that any passenger who executed this release, and who would not have been injured if he had not been riding in the baggage car, was deprived of the right to recover. And in the Hosmer case, where the accident involved the whole train and the messenger might have been injured even if he had not been riding in the baggage car, the Court, abandoning to a certain extent the reasoning in the Bates case, held that the right to ride *free* in the baggage car brought the case under the rule in *Quimby* v. *R. R. Co.*, 150 Mass., 365, where it was held that a *free passenger* was bound by the contract endorsed on his pass releasing the carrier from liability for negligence.

The Massachusetts cases concede that the rights of an ex-

press messenger are those of a passenger for hire of a common carrier. As said by the Court in the later case of *Doyle* v. *Ry. Co.*, 166 Mass., 498, reviewing these cases, they hold that

"If a *passenger* insists upon riding or is required by the nature of his occupation to ride in a place not provided for passengers, it has been held that the carrier may properly say to him that he must take the risk, however arising. *Hosmer* v. *Co.*, 156 Mass., 506; *Robertson* v. *Co.*, 156 Mass., 525; *Bates* v. *Co.*, 147 Mass., 255."

Now, treating that as an authoritative statement of the point decided in the Bates and Hosmer cases, how does it accord with the rule in the Federal courts?

Take the case of a drover. Is he not in the very language of this Massachusetts case

"A passenger who is required by the nature of his occupation to ride in a place not provided for passengers?"

May "the carrier properly say to him that he must take the risk, however arising?" Does not the Federal rule except risks occasioned by the negligence of the carrier or its agents? *Lockwood* v. *Co.*, *supra*; *R. R. Co.* v. *McLaughlin*, 19 C. C. A., 551.

If an injured or sick passenger is taken on a stretcher or mattress into the baggage car, there being no accommodations in the ordinary coaches for a man in his condition, may the carrier exact from him a release? No; the carrier having accepted one who is so obliged to ride, is bound to exercise the same degree of care for his safety that is due to any passenger. And, in like manner, the attendants of such a passenger, or a medical man engaged to attend him, would be entitled to the same protection if the carrier accepted them for passage. And the carrier can not exact the right to negligently render their journey in that car unsafe if it received them for transportation, knowing that they would be obliged to travel in that car.

Suppose the baggage master fell ill and a doctor were summoned by the conductor, he would be guilty of no contributory negligence in remaining in the baggage car long enough to render the needed assistance, and no subtlety of language could frame a release that should confer immunity upon the carrier in negligently injuring him while there.

Suppose a train break down in the wilderness, and only the engine and baggage car can proceed, the carrier could not extort a release from the passengers as a premium for permitting them to ride in the baggage car to a place of shelter. They would not even be obliged to assume the extra risk of riding in that car nor be guilty of contributory negligence in so doing. The company would simply have to be so much the more careful of its baggage car because it was full of passengers. And the carrier is bound to as high a degree of care to one passenger in such a car as to a hundred. The duty is the same, although the penalty for violation might be greater in the latter case.

The Massachusetts rule is that a passenger for hire traveling in a place of special danger may assume the risk of the carrier's negligence while there. The Federal rule is that in whatever place the carrier allows a passenger to ride he is under a public duty to make that place safe against the carrier's negligence, and can not substitute for the performance of the duty a stipulation for immunity. It is not a question of releasing the carrier as an insurer, a carrier of passengers is never so bound, but he must provide against dangers as far as his care can accomplish it, not by the right to be negligent.

It remains to consider the case of *Ry. Co.* v. *Keefer*, 146 Indiana, 21. The views of the Court are summarized, on page 34, in the following language:

"Under the doctrine declared in the Express Cases, 117 U. S., 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried with a messenger in charge, as a private carrier; the right to have it and him carried having first

been secured to the company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired. Appellee, when he went upon appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried from one point to another. Carriage was not the object of his going upon the train. That was merely incidental. His purpose was not to be upon the train in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the car-space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of the appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant, as a common carrier, could not have been compelled to grant. *Express Cases, supra; Bates* v. *Railroad Co., supra; Hosmer* v. *Railroad Co., supra.*"

The argument of this case may be analyzed thus:

The express company is a common carrier. The railroad company is not a common carrier of common carriers, therefore it is not obliged to contract as a common carrier to carry for the express company, and may thus insert in any contract it chooses to make any stipulations it may desire, even to the exemption from liability for negligently causing the loss of the merchandise carried or injury to the messenger accompanying the merchandise; that the contract is a private contract, which the railroad company may refuse to make, and it may therefore impose whatever conditions it pleases before consenting to make; that the express messenger is not a passenger for hire, to whom the carrier owes the duty of a common carrier of passengers.

The proposition that an express messenger is any the less a passenger of the railroad company because "he did not go as a passenger who merely desired to be carried on the train from one point to another," and because "carriage was not the object of his going upon the train, but was merely

incidental, that he might handle and care for, the property of his employer thereon in the car space set apart in the baggage car for that purpose," has been already examined and can not be maintained in the face of the Federal decisions as to a postal clerk and a drover, both of whom fall equally within the terms used.

There is some confusion of thought in the other proposition that because the railway company was not bound to contract with that particular express company, therefore, the rights of a messenger as a passenger are determined solely by the railroad company's contract with the express company by which his passage was secured, but not only the logic but the law of the proposition is wrong. We contend:

1. To the owners of the goods carried by the railroad company as express matter and to the messenger carried therewith, the railroad company can only limit its liability to the same extent as could any common carrier.

2. The sense in which the Supreme Court held that a railroad company was not bound to act as a common carrier of common carriers is that in the performance of its duty to the public to carry express matter and messengers it may select one agency by which to perform this duty and exclude other agencies, as it may select one employe rather than another applicant; or, as in doing business with connecting railroads in carrying to and from points beyond its line, it is at common law under no obligation to carry for common carriers, but may make such contract or none with them for connecting business as it chooses, yet, as to the property and persons carried by virtue of any contract it may make, it has no right to stipulate for exemption from liability for negligence.

In the Express Cases, 117 U. S., p. 1, the Court intimate that railroad companies are under a public duty to carry express matter and messengers, either by their own facili-

ties and force, or through the agency of an express company doing business over its line. The Court say, p. 20:

"The express business has now grown to an enormous size and is carried on all over the United States and in Canada. It has become a public necessity. It employs, for the purposes of transportation, all the important railroads in the United States, and a new railroad is rarely opened to the public without being equipped, in some form, with express facilities. It is used in almost every conceivable way for almost every conceivable purpose by the people and by the Government. All have become accustomed to it and it can not be taken away without breaking up many of the long settled habits of business and interfering materially with the convenience of social life.

"In this connection, it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The trouble in each case is not with the public, but with the single express company, and the real question is, not whether the railroad companies are authorized by law to do an express business themselves, nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person especially appointed for that purpose, nor whether they shall carry express freights for express companies as they carry like freights for the general public, but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. It is no doubt true that every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter." And on page 24: "So long as the public are served to their reasonable satisfaction it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to what particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to *insure reasonable promptness and security*."

This would indicate that the railroad company is bound to carry express matter and messengers. If the railroad company must as to the public *insure* "security" and "reasonable promptness," it cannot be permitted to contract itself out of this duty to the public, and stipulate for release from liability to the shippers for negligently performing it, or negligently causing loss of the goods or injury to the messenger.

The question has not often arisen between an owner who has shipped by express and the subordinate carrier by whose negligence the property is lost, for the owner usually prefers his action against the express company rather than against the subordinate carrier; but in the case of *New Jersey Co.* v. *Bank*, 6 How., 343, where by agreement between the steamboat company and the express company the crate of the latter and its contents were to be carried at the sole risk of the express company, *of which contract the shipper was informed*, upon a suit against the steamboat company by the owner of the goods lost, the Court held that this agreement could not exempt it, the steamboat company, as a common carrier, from liability for *misconduct* or *negligence*, and as the Court was of the opinion that the company had been guilty of negligence, it was held to be responsible to the owner for the loss. And the Court cite (p. 380), as a precisely analogous case, that of *Sanderson* v. *Lamberton*, 6 Binney (Pa.), 129, which "was an action upon the subcontract made by the first with the second carrier for the conveyance of the goods, in whose hands they were lost." The second or subordinate carrier was held liable as a common carrier for the loss, although the first carrier could also have been held.

In the case of *Delaware, Lackawanna & Western Ry. Co.* v. *Ashley*, 67 Fed. Rep., 209, the Lackawanna Ry. Co. was a subordinate carrier of Ashley who traveled in charge of certain live stock shipped originally on the Cleveland Railroad

Company's line on a through bill of lading. The car of live stock with Ashley in charge was tendered by the Cleveland Railroad Company at Buffalo to the Lackawanna Co., which as a condition of accepting it or acting as subordinate carrier under the Cleveland Company's contract of through shipment, required Ashley, who was in charge of the live stock, to execute a release from liability for negligently injuring him while being transported. Ashley executed the release and was injured while being carried by the Lackawanna Co. It was held in an action by him to recover for the injury that the release was invalid, and this ruling was affirmed by the Circuit Court of Appeals.

It would seem that this case presents a close likeness to the case at bar. The Lackawanna Railway Company was no more bound to carry the freight and man in charge for the Cleveland Ry. Co. than in the case at bar, the railroad company was bound to carry the goods and man in charge for the express company. But when it did accept the man in charge he became the passenger for hire of a public or common carrier, despite the contract releasing the railroad company from liability for negligently injuring him.

An express company like a railroad company which has contracted to deliver merchandise at a point beyond its own terminus must employ railroad companies, who act as subordinate carriers, to carry for it to destination. And if the property shipped, whether live stock or valuable parcels, be of a character requiring a messenger or drover to accompany them, the relation of such messenger or drover to the railroad companies carrying him is that of a passenger for hire of a common carrier, which relation is not changed by any release he may execute to the railroad company, for such release so far as it attempts to exonerate the common carrier from the duties imposed upon it by law is illegal and void.

In the case of *Atchison Ry. Co.* v. *Denver Ry. Co.*, 110 U.

S., 667, cited in the Express Cases, the Denver Company, whose track intersected that of the Atchison Company, sought to compel the latter to do a connecting business—to interchange freight and passengers at the point of intersection, and showed that the Atchison Company did such connecting business with the Rio Grande Company at a similar intersection near by.

The Court held, p. 682:

"Under these circumstances, to hold that if the Atchison Company continued to stop at the Rio Grande station after the Denver road was built, a refusal to stop at the junction of the Denver road was an unreasonable discrimination as to facilities in favor of the Rio Grande road and against the Denver road would be, in effect, to declare that every railroad company which forces a connection of its road with that of another company has a right at common law to require the company with which it connects to do a connecting business at the junction if it does a similar business with another company. Such is not the law. * * * Whether a connecting business shall be done over them after the physical union of the two roads is made depends on legislative regulations or *contract obligations*."

The Atchison Company, not being a common carrier for common carriers, was under no obligation to treat all common carriers alike, or haul for them over its line on the same terms as to division of rates or otherwise.

It might make whatever contract it pleased or none at all. It might therefore oblige any one of these carriers, as a term in any contract it might make, to include, for example, a stipulation for indemnity against liability for negligently injuring passengers or freight delivered to it.

But if such contract were in fact entered into, it could not determine the liability of the carrier for negligently injuring freight or passengers as between itself and the shippers or passengers, or for injuring a drover whose right to be upon the train was secured by such special contract, even if the drover did not go as a passenger who merely desired

to be carried on the train from one point to another, to whom carriage was not the object of going upon the train, but was merely incidental, and even if the drover had signed a release.

Nor if the initial carrier under such a private contract delivered to the second carrier a Pullman car of excursionists with their cook, and the cook, whose fare has been paid, was injured in an accident on the road of the latter company. The cook would be none the less a passenger because with him, in the language of the Indiana case, carriage was not the object of his going upon the train, but merely incidental, and his purpose was not to be upon the train in the cars provided for passengers, but that he might handle and care for the property of his employer in the car-space set apart in the car for that purpose.

Indeed, the whole argument rests on the fallacy that when a man becomes a passenger in pursuance of a contract for private shipment of goods his rights as a passenger depend on the terms of that contract, because the carrier had the right to refuse to contract, and therefore to make whatever contract it pleased. If that were so, then any private contract the railroad company might make involving as an incident the transportation of a passenger might undertake to fix the rights of such passengers. A man, who, having furnished locomotives to the railroad company was bound by the contract to make periodical trips to inspect them, might be required to release the company from negligence. Or to consider, as an illustration, the case of *Railroad Co.* v. *Stevens*, 95 U. S., 655, where, as an incident to a proposed contract for the use of a patented car coupling, a pass is issued to an inventor in order that he might exhibit his invention to an officer of the company. This transportation is incident to a purely private contract into which the railroad company is in no wise compellable to enter. The Court held that such

a contract can not by any stipulation for release deprive the passenger of his right to be safely carried. Or suppose, as often happens, a pass with such a stipulation is given to an inventor as part of the price or royalty for the use of his invention. It is unnecessary to argue that such a stipulation would be void. Yet the contract for the invention is not one into which the carrier must enter.

In *Pearson* v. *Duane*, 4 Wall., 605, the carrier was held liable to a passenger whom it might have refused and the Court say should have refused. Yet the carrier in accepting him would have had no right to stipulate for exemption from liability for negligence. A steamship may be so crowded that it may decline to take any more passengers, but if in that state of facts an applicant is given the captain's cabin, or accommodation in some part of the boat not provided for passengers, a release taken under those circumstances would have no more validity than if taken from any other passenger on the ship. A drunken man may be refused, but if accepted the company can not relieve itself from liability for negligently carrying him. So even if the railroad company has the right to refuse to carry an express messenger, it by no means follows, but on the contrary begs the whole question at issue, to claim that it may accept him on terms which relieve it from the duty which it assumes by accepting him at all—that of using due care to carry him in safety. There is yet to be found any case where a Federal Court has sustained the contract of any carrier exempting it from liability for negligence injuriously affecting in life or limb any passenger, whether gratuitous or for hire.

In *Mitchell* v. *Marker*, 62 Fed., 139, Mitchell owning an office building, was held to be a common carrier of passengers carried on an elevator. Would he be any the less such if he rented the top floors of his building to an express company, and made with it a contract for indem-

nity? Or, if the express company should procure for him a release from liability from negligence in carrying messengers and employes with express matter who mightuse the elevator in transit between the offices and the street? If so, then such contracts with tenants will save the present expense of insurance, and if not, then the rule should apply to horizontal as well as vertical transportation.

And the express messenger does not even derive his right to be carried from the contract alone. His right to use the public conveyances of the country in the vocation in which he labors is one of which he can not be deprived. If he could be, then all of his class could be so be denied, and the carrier would stand convicted of a refusal to perform the public duty of carrying express matter over its railroad. It does not answer to say that the railroad company may choose to do its own express business, for the messenger must still be carried, and though in the capacity no longer of a passenger but an employe, yet no stipulation for release from its negligence will avail to protect the carrier as his master. Or, if he chose to carry on, as an express messenger, a business limited to such papers or bank collections as should not require the use of the express car, why may the carrier deny him the right to travel by the public highway or the public conveyances, provided his fare was paid and his behavior unobjectionable?

The cases of

Coup v. *Ry. Co.*, 56 Mich., 111.
Ry. Co. v. *Wallace*, 66 Fed. Rep., 506.
Robertson v. *Ry. Co.*, 156 Mass., 525.

were evidently decided under the influence of the English doctrine that a contract for the transportation of live stock is not a common carrier's contract.

This doctrine was not without its influence upon some of the earlier stock-drover cases, but was disapproved by the

Supreme Court of the United States and for reasons which we think apply to the case of a person injured or killed while being transported under a "circus train" contract.

In any view, however, these "Circus Train Cases" present no real analogy to the case at bar.

The goods or things to be carried—the subjects of the bailment—are not such as the carrier is under any public duty to carry or holds himself out as in the business of carrying. The contract is entered into as a special accommodation. It is not the daily occupation of the carrier, nor is it a public necessity that circus trains be afforded railroad facilities. The wild beasts and paraphernalia are not of a kind that the carrier is prepared to care for or be responsible for. None of the cars belong to the company; it does not inspect them or repair them, nor may it adapt them to the tracks, curves or bridges on its line. The train itself does not belong to and is not in the custody of the carrier. The service is performed under conditions so unusual, so unlike anything in the line of the carrier's occupation, and fraught possibly with so many perils that in the ordinary course of the carrier's business can not be anticipated or provided against, that the carrier might, if ever, be permitted to substitute for the necessity of taking such unusual and unfamiliar precautions a contract for immunity. It is almost a misnomer to call it a contract of release from liability for negligence, for negligence is the breach of a duty and what duty did the carrier assume either by the contract or as a matter of law except to tow the circus cars over its track?

In the last cited case, that of *Robertson* v. *R. R.*, 156 Mass., 525, the carrier made a special contract to haul circus cars, the property of and under the control of the circus company, under a contract by which the circus proprietor assumed all risks of injury to the persons or property carried. One of the cars broke down by reason of a defective truck. It was held that as the defendant had no

control over the condition of the cars and no power to infere with them, it was under no duty to the injured person to inspect the cars. Consequently there was no negligence, and no one has ever contended that a carrier has not the right to contract for exemption from liability for loss *not* occasioned by its negligence.

The other "Circus Train Cases" were suits by the owner for injuries to his property. Neither was an action for personal injuries *by the person injured*. Nor do they decide that in an action for personal injuries the liability of the carrier to the person injured would be governed by the contract with the circus owner and not by the law of liability for failure to exercise due care.

Counsel say that the railroad company's agreement is simply to tow the express car as a steamboat tows a barge or an engine tows a circus train. On the contrary the distinction is of essence. The railroad company's contract with the express company is one of carriage, not of towing. It agrees to carry on its train the express freight and messenger, and the express company, although the carrier of the merchandise, never became the carrier of the messenger. The express company is no carrier of passengers. The railroad company is the only carrier concerned in or responsible for the safe carriage of the messenger. The express company simply agreed to pay his fare and insure the railroad company against liability for injuring him. A railway train is a unit, not a group of separate parts, and the express car belongs to the railroad company as much as does any other passenger coach or freight car, the express company having only the right to have its parcels and the messenger carried therein. The express car is not hauled separately. It is part of the train as a link is part of a chain. All parts of the train have the same starting point, the same inspection, the same crew, the same time card, the same train orders, and

are under the same command and control as a unit. The separate cars are no more separate units than are the cabins or compartments of a steamer. And the conductor bears to the whole train the same relation that the captain bears to a steamship. An express agent on a railroad train does not differ from one traveling under the same kind of contract on a steamboat where there can be no pretense that he is being carried in a special or different vehicle from the other passengers. It might as well be said that the contract with a drover to furnish a stock car for his cattle is a contract to tow a special car, and not a carrier's contract.

The agreement between the express company and the railway company was not to a tow a car, but to furnish accommodation on the railway company's trains. On one train this might involve providing a separate car, on another space in the baggage car, on another space in an ordinary passenger coach. The railway company was not bound to provide a separate car on this train unless the volume and kind of business required it.

The railway company could have placed the express car in the rear or the middle of the train. The position, in fact, assigned to the express car was a mere matter of convenience. Except so far as the convenient and safe carriage of the express company's parcels required, the express car was wholly under the management and control of the railway company's conductor and train crew.

A railway company is not less the carrier of a passenger because it permits the Pullman Company to carry him in a car of its train in which nobody may ride except upon condition of complying with the Pullman Company's rules. In short, the special car is a mere matter of convenience to the railway company in handling the express business. Such arrangement does not alter the legal relation of the carrier and the messenger, for the carrier can not deprive

a passenger of his character as such by putting him in a special car or by erecting a partition between that part of the car which he occupies and that occupied by the other passengers.

Counsel, in referring to the illustration used by the Supreme Court in the Lockwood case in describing a contract of private carriage, *i. e.*, that of a common carrier of truck agreeing, as a special accommodation, to transport articles of special value, lose sight of the very distinction the illustration was employed to enforce, viz., that the owner of such a vessel has a broader right to decline employment and dictate terms than has a railroad corporation organized and enjoying peculiar franchises as a public carrier. The former may become, as to a special service, a private carrier; the latter can not, by agreement or by calling itself a private carrier, change the nature of the duties owed by it to the public. This important distinction between the public obligation resting upon a railroad company to do or permit to be done over its lines an express business and the obligation of a mere casual undertaking of private carriage, upon extraordinary occasion, outside of its business and foreign to its duties as a railroad company, is throughout the argument overlooked or ignored by counsel.

We have not disputed the proposition that a railroad company is not a common carrier of express companies. As between them it may discriminate or it may deny them privileges, but as to the persons and goods received by it for transportation it owes a duty of diligence to the person carried and to the owner of the goods which it can not escape by contract or notice. It owes the duty, as the Express Cases put it, to carry for the public with "reasonable promptness and security." Its relations to the persons and goods carried and its relations to the express company, are the same as if it were carrying for a connecting carrier,

who had issued a through ticket or a through bill of lading for the goods.

While the express company might agree to indemnify the railroad company against claims for damage by negligence to persons or goods carried, yet it could not, by any such contract, deprive persons carried or the owners of the goods carried of their right of action against the railroad company for negligence. The express company can not sell such a right of action, nor can the railroad company, either mediately or immediately, buy such immunity.

We concede without question that the contract between the express company and the railroad company, so far as it grants exclusive privileges to the express company, is a private contract, and that the fare of the messenger is covered by the contract, and to that extent his right to be on the train depends upon the contract and his employment by the express company. But that does not affect his status as a passenger or his right to safely travel. The railroad company might make a private contract with a bridge builder to repair a bridge, and agree that it would transport his workmen in the baggage car without charge. As soon as they boarded the train the jural relations of passenger and carrier would be entered upon, and there would arise a duty of care on the part of the carrier independent of and not to be affected by the contract between the railroad company and their employer. Nor would any contract of theirs with their employer to release the carrier from liability for negligence be valid here, although made a condition of their employment, however it might be in a jurisdiction which permitted the carrier to so contract with a passenger.

It is true, as counsel urge, that contracts of this nature are sustained in New York, Massachusetts and Indiana. But such ruling in the New York cases is expressly put upon the ground, as in England, not that the ordinary re-

lation of common carrier and passenger for hire does not exist between the express messenger and the railroad company, but that any passenger for hire of a public or common carrier may release the carrier from liability for negligence for a consideration, such as reduction of fare; and in Massachusetts that this may be done by a passenger for hire of a common carrier in consideration of a special privilege of riding without extra charge in a special part of the train. The simple answer to this is that such is not the Federal rule. The Massachusetts case also relies upon the analogy between the free privilege of riding in a special part of the train and the privilege of riding on a free pass with similar stipulations, which it had already held in such case valid. But this Court has strongly intimated that it would not so hold. *Ry. Co.* v. *Stevens*, 95 U. S., 655.

In the Indiana case such contract is sustained on the assumption that a railroad company, in selecting an express company as its agent in discharging its public duty to carry express matter, may by contract stipulate for exemption from the duty imposed by law to use due care to carry the messenger in safety. Such doctrine, we submit, can not legitimately be derived from the authorities relied upon by the Court in that case, and its vice becomes apparent when it is tested by the analogy indicated by the Supreme Court in the Price case (113 U. S., 218), between an express messenger and a postal clerk. To be consistent, the Indiana Court must hold either that a postal clerk is not a passenger for hire of a common carrier, or that as a passenger for hire of a common carrier he may make a valid contract exempting the railroad company from liability for negligence. Neither of these propositions is law in the Federal courts.

Counsel cite the Seybolt case, 95 N. Y., 563, in support of his proposition that "a postal clerk stands on an entirely different footing from an express messenger" be-

cause he is secured "an absolute statutory right to transportation over the railroad." But in *Price* v. *R. R. Co.*, 113 U. S., 218, the Court hold that this is not true; that the postal clerk does not derive his right to be carried from the statute, and does not stand on any different footing from an express messenger. It is true the Court do not particularize an express messenger, but the language used precisely describes such an employe.

Counsel have commented upon the large number of authorities establishing the proposition that an express messenger is a passenger for hire, and say that as there was in none of these cases any contract defining the rights of such a passenger for hire, these authorities have no bearing. It will be observed, however, that in quite a number of these cases such a contract attempting to limit the rights of the passenger *was* involved, and in each case the Court, so far from considering that the messenger ceased to be a passenger for hire by reason of the contract, treated the contract as one attempting to limit the liability to him as a passenger for hire, not to be be distinguished in any way from any other passenger for hire of a common carrier, and the only question was how far could such a contract be valid as against the rights of passengers for hire generically.

Jones v. *Ry. Co.*, 125 Mo., 666.
Kenney v. *Ry. Co.*, 125 N. Y., 422.
Brewer v. *Ry. Co.*, 124 N. Y., 59.
Jennings v. *Ry. Co.*, 15 Ont. App., 477.
Chamberlain v. *Pierson*, 87 Fed., 420.

And it is surely a novel proposition in the Federal Courts that a passenger for hire, entitled to the high degree of care exacted by public policy from a common carrier, may cease to be a passenger for hire by virtue of a contract exempting the carrier from negligence. The answer seems to be obvious. If a man is a passenger for hire, as these cases decide, entitled to the highest care on the part of the

carrier, then *no* contract for exemption from this duty is valid, and it is therefore not only immaterial what contract the carrier had made, but whether it had made any at all. Even in the instances where the carrier was not bound to accept the passenger, it could not as the price of its acceptance impose any such contract.

And under the contract entered into by the railway company it did not refuse to accept the express messenger as a passenger, and the express company was not bound to exact such a release from the messenger. Its only stipulation was that the express company should insure it against the liability it would be under if it negligently injured such passenger. The railway company might have effected such insurance with the express company for all the passengers on the train without affecting their right to recover, even if the express company had thereafter procured from every passenger a contract releasing the railroad company. Such a contract of release would be no more valid than if made by the passenger directly with the railroad company.

While counsel for plaintiff in error urge the proposition that the railroad company may avail itself of this exemption, because in accepting the express messenger it had the right to fix whatever conditions it chose, the inconsistent proposition is also advanced that the conditions it did in fact impose did not establish his status while so traveling. The fallacy is apparent. If the contract between the railroad company and the express company provided, as it in fact did provide, that the railroad company would accept for passage and carry the messenger without other condition than that the express company would indemnify the railroad company from its liability for negligently injuring him, then if the messenger presented himself for passage the railroad company can not superadd or require a stipulation for release, either for its benefit or for the ben-

efit of the express company. Nor can the express company interpolate such a stipulation after the railroad company has agreed to accept the messenger without it. Such release would have no validity. This form of contract was doubtless drawn at the headquarters of the United States Express Company in the state of New York, where such a contract is valid. It is drawn upon the lines indicated in the Kenney case, the latest decision of the New York Court of Appeals upon the subject. The contract is valid in New York and the effort is here made to claim for it legal validity, not on the ground recognized in the New York Courts, however, that a passenger and carrier may make such a contract, but on a ground which the New York Courts repudiate, that the passenger is not a passenger, and the carrier is not a carrier in legal intendment.

We make no such contention as is imputed to us that a railroad company must permit an express company to do business on its passenger trains. We concede that the railroad company may do its own express business or may refuse to do the express business on its passenger trains; may have, for example, a special train consisting of nothing but an express car and a postal car. But the express messenger and postal clerk would be entitled to the same care and protection as if they were traveling in a passenger train. And if the railroad company chose itself to do the express business with the messenger as its employe such a contract for exemption from the duty imposed by law, of care for his safety or of release from any liability it might be under for negligence would be equally invalid.

Of the three grounds upon which a common carrier is not permitted to stipulate against its own negligence, it seems clear that all are present: 1. It is conceded that in the absence of the contract the duty would be imposed by law to carry the messenger safely. Is not the contract, then, an

"effort to release the carrier from a duty imposed by law?" 2. "The parties do not deal on an equal footing." That is, the railway company might compel an intending traveler to give up his journey, and lose the benefit of it to his business, if he would not execute the release. Precisely the same compulsion, under the same circumstances, is put upon the messenger. 3. "The stipulations tend to a relaxation of that vigilance which the carrier should exercise." Is not the safety of the other passengers in the train affected if the carrier may with impunity derail the express car and kill the messenger.

Counsel say the messenger was not a passenger nor even an employe of the railway company, but no authority is cited for this assertion, and no attempt is made to define his status. He was no trespasser. He was on the train of a public carrier of passengers with its knowledge and consent and for fare paid and accepted. We know of no definition of a passenger that would exclude him. He was not a mere licensee. *Bennett* v. *Ry. Co.*, 102 U. S., 584.

Counsel assert that the railway company received no compensation for carriage of the goods, has no custody of them, nor any lien for freight. The fact that the compensation comes to the railroad company in a lump sum does not make it any the less payment for the services rendered, which were essentially the carriage of the goods and messenger. If the railroad company chose to receive from a connecting carrier all its cattle business for a lump sum per annum in the custody of drovers, and waive its lien for freight, it would none the less be liable to the shipper and drovers for its negligence as a common carrier.

The case cited by counsel, *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S., 174, simply holds that an express company is as to the shippers a common carrier of goods received by it for shipment. The Court do not decide that the railroad company is not also a common carrier of the

goods. But in any view the deduction that the railroad company was not a common carrier of the messenger because it might not be as to the goods is a *non sequitur*; for while the express company was a common carrier of the goods it was not a carrier of passengers. The railroad company was the *only* carrier of the messenger. The express company agreed with the shippers to carry the goods; it never agreed with the messenger to carry him; it simply paid his fare on the regular conveyances between the points it had agreed to send the goods in his charge. Had he carried them all in a valise in the parlor car the express company would still have been a common carrier of the goods and he the passenger of the railroad company, not of the express company.

In the inception of the express business Harnden in person collected the parcels, specie, drafts, etc., from his customers and carried them in a satchel from New York to Boston, paid his fare and made the journey by whatever train or steamboat best suited his convenience. There could be no pretense that he was not an ordinary passenger for hire, and when his employes were sent these did not cease to be such passengers.

Suppose today an express messenger with a valuable package takes an omnibus or a street car on his way to the train: Is the street car company any the less a common carrier of the messenger because he happens to be a servant of another common carrier?

Counsel ask whether the railroad company would be liable if the express company ran its own train over the railroad company's roadbed instead of employing the railroad company to carry the freight on its train. It may be the railroad company would not be responsible for the passengers on another company's train—a train which it did not inspect, control or run; but, as in the case at bar, the messenger was injured by the railroad company's neg-

ligent running of one of its own trains upon which it had undertaken regularly to carry him, the analogy fails in the most important feature.

To the suggestion that railway companies can not do an express business, it may be answered that some of them do conduct such a business, and that nothing but considerations of profit and convenience deters any railway company from it. It is merely a matter of proper organization. As a rule the railway companies prefer to leave the express business to independent companies, just as formerly they relinquished certain kinds of freight business to what were called fast freight lines.

Counsel cite no authority to support the proposition that if the railroad company is a private carrier it may stipulate for immunity in *negligently* injuring the messenger, and we conceive the contrary is true. A much less degree of care than is required of a public carrier would satisfy the obligations assumed by a private carrier. Against liability for want of skill, knowledge, or sound judgment, a private carrier may perhaps relieve himself by contract, for he is not necessarily held to the exercise of such qualities; but against liability for pure negligence, inflicting personal injuries—a breach of such duty as is required by the law—there is no Federal authority which recognizes his right to exempt himself.

Counsel say the express car is "rented" to the express company, and practically belongs to it. This will not stand the test. If the express company should act on that theory and take the car to any other road, or use it between trips as a warehouse or depository for packages, the railroad company would put a different construction on the arrangement. It is a contract merely for carriage in car space in motion over the line. The express company has no other right or title to the car, and could not put in it any person other than the messenger. It is quite analogous to the

title a passenger has to his seat. He may occupy it and within the limits recognized by the railroad company put his packages in it, but he has no other right to it.

To sum up, we would say the relations of a railroad company to the goods and messenger carried under the contract with the express company are the same as those of any subordinate common carrier under a contract of through transportation.

No such subordinate carrier may exempt itself by contract with the initial or primary carrier from liability to shippers and passengers for negligently injuring goods or passengers, though it may stipulate for indemnity or insurance.

An express messenger who has made no contract releasing the railroad company bears to it the relation of a passenger for hire of a common carrier. This is established by all the authorities and practically admitted by counsel.

To say that the contract of release changed the relation of the express messenger to the railroad company as its passenger for hire is but to say that a common carrier may by contract relieve itself from liability for negligently injuring its passenger for hire.

It is not necessary to here argue that such a contract can have no such effect.

We submit that the question certified should be answered in the affirmative.

Respectfully submitted,

CHARLES M. CIST,
Counsel for Defendant in Error.

EDGAR W. CIST,
Of Counsel.